

**BOARD OF APPEALS CASE NO. 065**

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**BEFORE THE**

**APPLICANT: FLOW DEVELOPMENT, INC.**

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**ZONING HEARING EXAMINER**

**REQUEST: Rezone 45.533 acres from  
Agricultural to R1 classification;  
MD Route 543, east side U. S. Route 1,  
Bel Air**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 6/21/95 & 6/28/95**

**HEARING DATE: July 31, 1995**

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**Record: 6/23/95 & 6/30/95**

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### **ZONING HEARING EXAMINER'S DECISION**

The Applicant, Flow Development, Inc., is requesting the rezoning of three parcels totalling 45.53 acres in the aggregate, from its present AG to R1. The Applicant states that the basis for the rezoning request is that a mistake was made by the County Council in failing to rezone the property during the 1989 Comprehensive Rezoning process.

The subject property consists of the following three parcels, each of which is presently zoned AG:

Parcel 331-South side MD Route 543, 22.14 acres  
Parcel 479-West side MD Route 543, 0.491 acres  
Parcel 339-East side U.S. Route 1, 22.902 acres

Each of these parcels is more particularly identified on Tax Map 41. The parcels are contiguous with each other and are located within the Third Election District.

Morris H. Wolf, President of Flow Development, Inc. (hereinafter, "Flow") appeared and testified that Flow is the contract purchaser of the three subject parcels. Wolf described the residential subdivision he plans to build which will be called "Vineyard Oak". Eighty single family lots are planned for the subdivision if rezoning is granted. The witness described the parcels as an island of AG property surrounded by industrially and residentially zoned properties. Vineyard Oak is already underway on adjacent, residentially zoned property and the proposed development would be integrated with the earlier construction.

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Mr. Ross Bregel appeared as the owner of the subject parcels, 331 and 479. Mr. Bregel stated that the property has never been used agriculturally and, in his opinion, is not suited for agricultural use. The witness stated that he was unaware of comprehensive rezoning during 1989 and had no discussions with anyone at that time regarding rezoning of the property. Mr. Bregel confirmed that Flow is the contract purchaser of the properties he presently owns.

Mr. Wes Guckert appeared next and qualified as an expert in the field of traffic. Mr. Guckert explained thoroughly the traffic analysis he conducted on behalf of the Applicant (Applicant's Exhibit 18). Mr. Guckert concluded that traffic would not be adversely impacted as a result of the proposed residential development.

Mr. Guckert stated that he was familiar with the Bel Air Bypass East-West Highway extension project. He stated that the project has been planned for many years but has never gotten started. Referring to excerpts of the State Highway Administration CTP regarding the project, Guckert explained that the road alignments have changed a number of times over the years that the project has been pending. In 1988, the project called for the extension of MD Route 23 easterly past Route 1 through the subject property, intersecting with MD Route 543 near Thomas Run Road. In late 1989-1990, the alignment changed, deleting the extension of Route 23 east of Route 1. Because of the dates of the change, Guckert opined that the County Council could not have known about the later deletion of the extension of Route 23.

Mr. Thomas O'Laughlin appeared as an expert in land development and site plan design. The witness described the project by referring to the concept plan (Applicant's Exhibit 22). The concept plan denotes the location of 80 single family homes with a loop road system. The points of ingress/egress will be two in number, both on Route 543. The subject property is served by public water and sewer. The witness described the terrain of the parcels as rocky, with trees, slopes, wetlands and poor soils, all making the property most undesirable for agricultural uses. The vast clearing required for AG usage would be cost prohibitive and even if accomplished would contribute to adverse impacts to the water quality, impacts that could be avoided during residential development by the required grading permits, sediment control measures and storm water management systems.

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Mr. O’Laughlin explained that there had been changes to the water and sewer service to the property since 1989. In 1989 the water pressure was very poor in the area and there was no sewer service. Since then, an elevated water tank has been installed improving water pressure in the area. Additionally, sewer service has been added since 1989. The witness opined that the County Council could not have known of these subsequent changes in 1989. He is aware that some of the property owners who have septic systems in the area are experiencing problems due to wet, rocky soils in the area, leading him to believe that one or two dwellings only could be serviced by septic systems on the three subject parcels.

Next to testify was Mr. Denis Canavan who qualified as an expert land planner. The witness indicated that the subject property is classified on the Master Plan as medium intensity (seven units per acre) and is within the development envelope. Mr. Canavan stated that the County Council employed two policies during 1989’s Comprehensive Rezoning regarding the rezoning of properties that are material to the case at hand. They are, first, that properties be rezoned in a manner consistent with the Master Land Use Plan and, secondly, split zoned parcels be avoided. He noted that AG zoning is not consistent with the Master Land Use Plan and that Parcel 339 is split-zoned AG and R1, with the AG zone landlocked.

Mr. Canavan stated that the property is not suitable as agricultural property because of poor, wet soils, presence of wetlands, steep slopes and rocky terrain. Additionally, he opined that Agricultural uses on these parcels would have an adverse impact on surrounding residential property uses. Mr. Canavan stated that rezoning the parcels to R1 was logical because of its location on Route 543 and its proximity to the existing subdivision.

Mr. Canavan said that he believed that the only possible reason the Council considered AG zoning was appropriate during the 1989 Comprehensive Rezoning was their belief that the Hickory Bypass would be constructed and Route 23 would be extended through the property. Based on the 1989 SHA maps, that extension of Route 23 would have rendered most of the property unusable. Based on current maps, however, any extension of Route 23 would not impact the subject parcels. In Canavan’s opinion, if the Council had been aware of all of the future changes regarding the property, it would not have maintained the AG zoning for this property.

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Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, appeared next. Mr. McClune disagreed that a mistake was made by the Council in 1989. He did not disagree, however, that AG zoning was inconsistent with the Harford County Master Land Use Plan. Additionally, Mr. McClune said that he was of the belief that the proposed extension of MD Route 23 through the subject property was one of the major factors considered by the Department of Planning and Zoning and the Council in regard to maintaining AG zoning on this property during the 1989 Comprehensive Rezoning process.

Two area residents appeared in favor of the proposed rezoning, George Carter and Norman Zimmers. Evelyn Kreiner, Doris Ann Buchanan, Joseph Kozlowski and Katherine Jones opposed the rezoning, each stating general concerns regarding traffic conditions that may result from such a development.

**CONCLUSION:**

In Maryland, there is a strong presumption of correctness of original zoning and comprehensive rezoning. To sustain a piecemeal change in zoning, strong evidence of mistake in the original zoning or comprehensive rezoning...must be produced. Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973).

In Maryland, a property cannot be rezoned simply because the property owner wants it rezoned or even if the zoning authority believes the property should be rezoned. Before any property can be rezoned, there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of Special Appeals in Boyce v. Sembly, 25 Md. App. 43, 344 A.2d 137 (1975).

"It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council...

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Because facts occurring subsequent to comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning."

The Court in Boyce further stated:

"...is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied on by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake can also be established by showing that the events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome, and the question of error is not fairly debatable."

The Hearing Examiner is satisfied that the Applicant has met its burden of proof establishing that a "mistake", in the legal sense, has occurred in regard to the 1989 Comprehensive Rezoning process and this property. It does not appear that the Council could have known that subsequent events would make the premises they relied upon regarding this property in 1989, invalid at some future time. First, as stated by Mr. McClune of the Department of Planning and Zoning, the proposed extension of Route 23 through the subject property in 1989 would have made most of the property unsuitable for residential use. In 1990, that possibility was eliminated when the SHA changed the plans for location of the Bypass. Secondly, there was no sewer service in the area at the time and water pressure was very low. Both of those facts have since changed.


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At the time of comprehensive rezoning in 1989, this property, zoned AG, was not in conformance with the Master Land Use Plan. One objective of the Council in 1989 was to eliminate split zoning, yet one of these parcels retained split zoning contrary to the clear policy of the Council. One can only surmise that the Council believed that Route 23 would eventually pass through the parcels and did not want to disturb the AG zoning in the event condemnation of right of way would be necessary.

R1 appears to be the appropriate zoning classification for this property. The topography consists of poor, wet soil conditions, steep slopes, heavy forest, and rocky conditions, making the property unsuitable for cultivation. Additionally, the R1 zoning classification is consistent with the Harford County Master Land Use designation for this property as "medium density". Although some neighboring property owners were concerned about potential traffic impacts, the Applicant, through the expert testimony of Mr. Wes Guckert, has demonstrated that traffic will not be adversely impacted as a result of the proposed development.

The Hearing Examiner, relying on the facts of the case and the principles laid down by the Court of Special Appeals in Boyce, supra., recommends that each of the three subject parcels be rezoned to R1.

Date October 2, 1995

  
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William F. Casey  
Zoning Hearing Examiner